

# Prop 100 Rule Change Proposal

## May 21, 2007

### ARIZONA RULES OF CRIMINAL PROCEDURE

#### RULE 4. INITIAL APPEARANCE AND ARRAIGNMENT

##### Rule 4.1. Procedure upon arrest

**a. Timeliness of Appearance Before Magistrate.** A person arrested shall be taken before a magistrate without unnecessary delay. If the person is not brought before a magistrate within 24 hours after arrest, he or she shall immediately be released.  
*(Although the following sections are not included in the revision, I have indicated below where I think the wording could be improved.)*

**b. On Arrest Without a Warrant.** A person arrested without a warrant shall be taken before ~~the nearest or most accessible~~ magistrate in the county of arrest, made available pursuant to section d., below, whereupon after which a complaint, if one has not already been filed, shall promptly be prepared and filed. If a complaint is not filed within 48 hours from the time of the initial appearance before the magistrate, the defendant shall be released from jail, and the preliminary hearing date, if any, shall be vacated.

**c. On Arrest With a Warrant.**

(1) A person arrested in the county in which the warrant was issued shall be taken before the magistrate who issued the warrant, or, if the magistrate is absent or unable to act, ~~the nearest or most accessible~~another magistrate in the same county.

(2) A person arrested in a county other than the one in which the warrant was issued shall be taken before ~~the nearest or most accessible~~ magistrate in the county of arrest, made available pursuant to section d., below. If such person is eligible for release as a matter of right, he or she shall be released in accordance with Rule 7.2. If the person is not released immediately, the magistrate shall direct that he or she be taken to the county where the warrant originated to appear before the issuing magistrate, or, if the magistrate is absent or unable to act, before ~~the nearest or most accessible~~another magistrate.

**d. Assurance of Availability of Magistrate and the Setting of a Time for Initial Appearance.** Each presiding judge shall take such steps as are necessary to assure that a magistrate is available every day of the week to hold initial appearances required by Section (a). In addition, the presiding judge shall also assure that at least one fixed time is set each day for conducting initial appearances and that local law enforcement agencies have been notified of the fixed time(s).

##### Rule 4.2. Initial appearance

**a. In General.** At the suspect's initial appearance, the magistrate shall:

- (1) Ascertain the suspect's true name and address and, if necessary, amend the formal charges to reflect it, and instruct the suspect to notify the court promptly of any change of address;
- (2) Inform the defendant of the charges;
- (3) Inform the defendant of the rights to counsel and the right to remain silent;
- (4) Determine whether probable cause exists for the purpose of release from custody. If no probable cause is found, the defendant shall immediately be released from custody;
- (5) Appoint counsel if the suspect is eligible for and requests appointed counsel under Rule 6;
- (6) Consider comments offered by the victim concerning the conditions of release. The magistrate shall permit the victim to comments, orally or in writing, on the issue of the suspect's release;
- (7) Determine the conditions of release in accordance with Rule 7.2 including a determination of whether the defendant is ~~non-bailable~~not eligible for release (I believe, and the statutes seem to convey, that "offenses" are bailable, not "-defendants.") pursuant to A.R.S. § 13-3961; and
- (8) For summoned defendants charged with a felony offense, a violation of Title 13, Chapter 14, or Title 28, Chapter 4, or a domestic violence offense as defined in § 13-3601 the court shall order that the defendant be fingerprinted at a designated time and place if it appears that the defendant was not previously fingerprinted.

**b. Misdemeanors: Felonies Charged by Indictment.** When a suspect charged with a misdemeanor or indicted for a felony is brought before a magistrate for defendant's initial appearance, defendant may, in addition to the procedures set forth in Section (a), be arraigned in the manner prescribed by Rule 14, if counsel is present or waived. If the appearance is before a magistrate without jurisdiction to try the offense, the magistrate shall transfer the case to the proper court for arraignment. If the court finds that delay of the arraignment is indispensable to the interests of justice, the court shall provide sufficient time for notice pursuant to Rule 39(b)(2) when setting a date and time for the continued arraignment.

**c. Felonies Charged by Complaint.** When a suspect is charged in a complaint, the magistrate shall, in addition to the procedures required by Section (a);

- (1) Inform the suspect of the right to a preliminary hearing and the procedures by which that right may be waived; and
- (2) Unless waived, set the time for a preliminary hearing in accordance with Rule 5.1.

## **RULE 7. RELEASE**

### **Rule 7.1. Definitions and applicability of rule**

**a. Own Recognizance.** "Own recognizance" means release without any condition of an undertaking relating to, or deposit of, security.

**b. Appearance Bond.** An "appearance bond" is an undertaking, on a form approved by the Supreme Court, to pay to the clerk of the court a specified sum of money upon failure of a person released to comply with its conditions.

**c. Secured Appearance Bond.** A "secured appearance bond" is an appearance bond secured by deposit with the clerk of security equal to the full amount thereof.

**d. Security.** "Security" is cash, a surety's undertaking, or any property of value, deposited with the clerk to secure an appearance bond. The value of such property shall be determined by the clerk, or at the clerk's or a party's request, by the court.

**e. Surety.** A "surety" is one, other than the person released, who executes an appearance bond and binds himself or herself to pay its amount if the person released fails to comply with its conditions. A surety shall file with an appearance bond an affidavit that he or she is not an attorney or person authorized to take bail, and that he or she owns property in this state (or is resident of this state owning property) worth the amount of the appearance bond, exclusive of property exempt from execution and above and over all liabilities, including the amount of all outstanding appearance bonds entered into by him or her, specifying such property, the exemptions and liabilities thereon, and the number and amount of such appearance bonds.

**f. Professional Bondsman.** Any person who is surety simultaneously on more than four appearance bonds is a "professional bondsman." No person may be a professional bondsman unless the person annually certifies in writing under oath to the clerk of the Superior Court that he or she

- (1) Is a resident of this state;
- (2) Has sufficient financial net worth to satisfy reasonable obligations as a surety;
- (3) Agrees to assume an affirmative duty to the court to remain in regular contact with any defendant released pursuant to an appearance bond on which the person is a surety;
- (4) Has not been convicted of a felony;
- (5) Has no judgments arising out of surety undertakings outstanding against him or her;
- (6) Has not, within a period of two years, violated any provisions of these rules or any court order.

Capacity to act as a professional bondsman may be revoked or withheld by the clerk, or by the court, for violation of any provision of this rule.

**g. Applicability.** This rule shall not apply to minor traffic offenses.

## **Rule 7.2. Right to release**

**a. Before Conviction; Persons Charged With an Offense Bailable as a Matter of Right.** Any person charged with an offense bailable as a matter of right shall be released pending or during trial on the person's own recognizance, unless the court determines, in its discretion, that such a release will not reasonably assure the person's appearance as

required. If such a determination is made, the court may impose the least onerous condition or conditions contained in Rule 7.3(b) which will reasonably assure the person's appearance.

**b. Before Conviction; Persons Charged With an Offense Not Bailable as a Matter of Right.** A person shall not be released on bail if the court finds the person is not bailable-subject to release pursuant to A.R.S. § 13-3961. If the allegation involves A.R.S. § 13-3961(A)(5), the person shall not be considered bailable-subject to release if the court finds that the proof is evident or the presumption great that the person committed a serious offense and that the proof is evident or the presumption great that the person entered or remained in the United States illegally. [NOTE: THIS SUBSECTION MAY CHANGE DEPENDING ON LEGISLATIVE ACTION REGARDING THE LEVEL OF PROOF]

### **bc. After Conviction**

(1) *Superior Court.* After a person has been convicted of any offense for which the person will in all reasonable probability suffer a sentence of imprisonment, the person shall not be released on bail or on ~~his or her~~ the person's own recognizance unless it is established that there are reasonable grounds to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding. The release of a person pending appeal shall be revoked if the person fails to prosecute the appeal diligently.

(2) *Limited Jurisdiction Courts.*

(A) *Conditions of Release Upon Appeal.* After a defendant has been convicted of any offense for which a sentence of incarceration has been imposed, upon filing of a timely notice of appeal, the defendant shall remain, pending appeal, under the same release conditions imposed at or subsequent to the time of the defendant's initial appearance or arraignment, except as provided in this subsection (~~bc~~)(2). The release of the defendant pending appeal shall be revoked if the defendant fails to prosecute the appeal diligently. A defendant held in custody pending appeal shall be released in the event the defendant's sentence is completed before the appeals has been decided.

(B) *Motion to Amend Conditions of Release.* Upon the filing of a timely notice of appeal, the state, or the court on its own motion, may move to amend the conditions of release when it appears there is a substantial risk that:

- (i) the defendant presents a danger to any person or the community; or
- (ii) the defendant is unlikely to return to court if subsequently ordered to appear on the particular matter.

(C) *Hearing.* The court shall set a hearing on such an application within three days of the filing of the motion. Such hearing may be continued for good cause shown. The defendant may be detained pending the hearing. At the hearing, which shall be on the record, the defendant is entitled to representation by counsel. Any testimony of the defendant shall not be admissible in other proceedings except as it may relate to compliance with prior conditions of release, perjury, or impeachment.

(D) *Findings.* Based on findings stated on the record, the court may amend the conditions of release in accordance with Rule 7.3. In determining the method of release or the amount of bail, the judicial officer shall, on the basis of available information, consider the nature and circumstances of the offense, family or local ties, employment, financial

resources, character and mental condition, the length of residence in the community, the record of arrests, convictions, and appearances at court proceedings, views of the victim, weight of the evidence, results of any drug tests, whether the accused has entered or remained in the United States illegally, whether the accused's residence is in this state, in another state or outside the United States, and any other factor provided by law.

(E) *Superior Court Review.* If the trial court enters an order setting a bond or requiring incarceration while the appeal is taken, the defendant may petition the superior court, at any time after such order is entered, to stay the execution of sentence and to allow the defendant to be released without bond or to require a lower bond.

**ed. Burden of Proof.** Issues under Rules 7.2(a) and (b~~c~~) shall be determined by the preponderance of the evidence. Issues under Rule 7.2(b) shall be determined by the burden of proof set forth in that paragraph. The prosecutor shall bear the burden of establishing factual issues under Rule 7.2(a), (b) and (b~~c~~)(2), ~~†~~The defendant shall bear the burden of establishing factual issues under Rule 7.2(~~b~~c~~~~)(1).

### **Rule 7.3. Conditions of release**

**a. Mandatory Conditions.** Every order of release under this rule shall contain the following conditions:

- (1) That the person appear to answer and submit to the orders and process of the court having jurisdiction of the case;
- (2) That the person refrain from committing any criminal offense;
- (3) That the person not depart the state without leave of court;
- (4) If released after judgment and sentence, that the person diligently prosecute his or her appeal.

**b. Additional Conditions.** An order of release may include the first one or more of the following conditions reasonably necessary to secure a person's appearance:

- (1) Execution of an unsecured appearance bond in an amount specified by the court;
- (2) Placing the person in the custody of a designated person or organization agreeing to supervise him or her;
- (3) Restrictions on the person's travel, associations, or place of abode during the period of release;
- (4) Any other condition not included in (5) or (6) which the court deems reasonably necessary;
- (5) Execution of a secured appearance bond; or
- (6) Return to custody after specified hours.

#### **Rule 7.4. Procedure**

**a. Initial Decision.** At the initial appearance before a magistrate, a determination of the conditions of release shall be made. The court shall issue an order containing the conditions of release and shall inform the accused of the conditions, the possible consequences of their violation, and that a warrant for his or her arrest may be issued immediately upon report of a violation.

**b. Subsequent Review of Conditions.** Any ~~person remaining in custody~~ party may in writing move for reexamination of the conditions of release whenever the ~~person's~~ case is transferred to a different court or the motion alleges the existence of material facts not previously presented to the court. The court may, on motion of the ~~defendant~~ party, or on its own initiative, reexamine or modify the conditions of release after giving the parties an opportunity to respond to the proposed modification. The motion shall comply with the requirements of this rule, Rule 35 and Rule 39. If the motion involves whether the person shall be held without bail, a hearing on the motion shall be held on the record before a magistrate as soon as practicable but no later than seven days after filing of the motion.

**c. Evidence.** Release determinations under this rule may be based on evidence not admissible under the rules of evidence.

**d. Review of Bond.** The court before which a misdemeanor is pending shall, no more than 10 days after arraignment, review the case file concerning the conditions of release of any defendant held in custody on bond for the purpose of determining the propriety of amending the conditions of release.

#### **Rule 7.5. Review of conditions; revocation of release**

**a. Issuance of Warrant or Summons.** Upon verified petition by the prosecutor stating facts or circumstances constituting a breach of the conditions of release, the court having jurisdiction over the defendant released may issue a warrant or summons under Rule 3.2, to secure the defendant's presence in court. A copy of the petition shall be served with the warrant or summons.

**b. Victim's Right to Petition for Revocation of Bond or Modification of Conditions of Release.** After consultation with the prosecutor, and if the prosecutor decides not to file a petition pursuant to section (a) of this Rule, the victim may petition the court to revoke the bond or release on personal recognizance of the defendant, or otherwise modify the conditions of the defendant's release, based on the victim's notarized statement asserting that harassment, threats, physical violence or intimidation against the victim or the victim's immediate family by the defendant or on behalf of the defendant has occurred.

#### **c. Hearing; Review of Conditions; Revocation.**

(1) *Modification of Conditions of Release.* If, after a hearing on the matters set forth in the petition, the court finds that the person released has wilfully violated the conditions of release, the court may impose different or additional conditions upon his or her release. However, if the defendant has violated the conditions of an appearance bond executed as a condition of release, the court shall determine conditions reasonably necessary to secure that person's appearance in the future. If the violation is not excused, the court

shall not impose less restrictive conditions of release. If the court determines that an increase in the amount of a secured appearance bond is necessary, that security shall be in addition to any previously existing security.

(2) *Revocation of Release.* The court may revoke release of a person charged with a felony if, after hearing, the court finds (A) that there is probable cause to believe that the person committed a felony during the period of release and that the proof is evident or the presumption great as to the present charge; or (B) that the person poses a substantial danger to any person or the community, that no other conditions of release will reasonably assure the safety of the other person or the community, and that the proof is evident or the presumption great as to the present charge.

#### **Rule 7.6. Transfer and Disposition of Bond**

**a. Transfer Upon Supervening Indictment.** An appearance bond or release order issued to assure the defendant's presence for proceedings following the filing of a felony complaint in justice of the peace court shall automatically be transferred to the same charge prosecuted by indictment, even though the felony complaint is dismissed.

**b. Filing and Custody of Appearance Bonds and Security.** Appearance bonds and security shall be filed with the clerk of the court in which a case is pending or the court where the initial appearance is held. Whenever the case is transferred to another court, any appearance bond and security shall also be transferred.

#### **c. Forfeiture Procedure.**

(1) *Notice and Hearing.* If at any time it appears to the court that the released person has violated a condition of an appearance bond, it shall issue a bench warrant for the person's arrest. Within ten days after the issuance of the warrant, the court shall notify the surety, in writing or by electronic means, that the warrant was issued. The court shall also set a hearing within a reasonable time not to exceed 120 days requiring the parties and any surety to show cause why the bond should not be forfeited. The court shall notify the parties and any surety of the hearing in writing or by electronic means.

(2) *Forfeiture.* If at the hearing, the violation is not explained or excused, the court may enter an appropriate order of judgment forfeiting all or part of the amount of the bond, which shall be enforceable by the state as any civil judgment.

#### **d. Exoneration.**

(1) At any time before violation that the court finds that there is no further need for an appearance bond, it shall exonerate the appearance bond and order the return of any security deposited.

(2) If the surety, in compliance with the requirements of A.R.S. § 13-3974, surrenders the defendant to the sheriff of the county in which the prosecution is pending, or delivers

an affidavit to the sheriff stating that the defendant is incarcerated in this or another jurisdiction, and the sheriff reports the surrender or status to the court, the court may exonerate the bond.

(3) In all other instances, the decision whether or not to exonerate a bond shall be within the sound discretion of the court.

**e. Post-Forfeiture Notice.** After entering an order of forfeiture, the court shall forward: (1) a copy of the forfeiture minute entry to the defendant, the defendant's attorney, and the surety; and (2) a copy of a signed forfeiture minute entry to the county attorney for collection.

#### **Rule 27.7. Initial appearance after arrest**

When a probationer is arrested on a warrant issued under Rule 27.5(b), his or her probation officer, if any, shall be notified immediately, and the probationer shall be taken without unreasonable delay before the court from which the warrant was issued, who shall advise the probationer of his or her rights to counsel under Rule 6, inform the probationer that any statement he or she makes prior to the hearing may be used against him or her, set the date of the revocation hearing, and make a release determination under Rule 7.2(~~b~~c).

#### **Rule 31.6. Stay of execution of sentence and credit pending appeal**

A sentence of imprisonment shall be stayed pending appeal when the defendant is released in accordance with Rule 7.2(~~b~~c). A defendant who remains in custody during the pendency of an appeal shall receive the same benefits as if no appeal has been taken.

A sentence to pay a fine or restitution shall be stayed pending appeal.